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To: Microsoft ATR
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Subject: Microsoft settlement

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This is a bad settlement. I shall extract a few of the pieces that are especially bad and comment on them:

"Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM or any intellectual property right that is not inconsistent with this Final Judgment. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Notwithstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered OEM that has received two or more such notices during the term of its Windows Operating System Product license."

The problem? "Covered OEM." The definition of a Covered OEM:

""Covered OEMs" means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective date of the Final Judgment. The OEMs that fall within this definition of Covered OEMs shall be recomputed by Microsoft as soon as practicable after the close of each of Microsoft's fiscal years."

No one else is protected by paragraphs containing this phrase.

More to the point, the 20 largest OEMs won't need to be affected by this document; these companies are loyal to Microsoft anyway and they sell enough Microsoft product that they can be affected by silly little flings with Linux or Netscape and still make Microsoft vast sums of money. And should one of them happen to start selling enough non-Microsoft product that they fall off the top-twenty list in Redmond, they become a non-covered OEM and thereby lose the protections of this agreement.

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"Ensure that a Windows Operating System Product does not (a) automatically alter an OEM's configuration of icons, shortcuts or menu entries installed or displayed by the OEM pursuant to Section III.C of this Final Judgment without first seeking confirmation from the user and (b) seek such confirmation from the end user for an automatic (as opposed to user-initiated) alteration of the OEM's configuration until 14 days after the initial boot up of a new Personal Computer. Microsoft shall not alter the manner in which a Windows Operating System Product automatically alters an OEM's configuration of icons, shortcuts or menu entries other than in a new version of a Windows Operating System Product."

This is missing a few words: "initial boot up *by the ultimate purchaser* of a new Personal Computer." Computers are initially booted up at the factory for quality control purposes. If the 14-day clock starts ticking the moment

the machine is booted up at the factory, the purchaser can lose all protection under this paragraph since it can take more than 14 days to get a computer through the supply chain from the factory to the point of purchase and into the hands of the consumer.

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"Notwithstanding the foregoing Section III.H.2, the Windows Operating System Product may invoke a Microsoft Middleware Product in any instance in which:

1. that Microsoft Middleware Product would be invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing), or
2. that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them."

Subparagraph 2 kills all the previous requirements for Microsoft to publish APIs and so forth. ActiveX is, or at least should be, a published standard. By redesigning Internet Explorer, or Windows itself, so that some of the "functionality consistent with a Windows Operating System Product" is contained in an ActiveX control which only Internet Explorer can invoke--it's not a technically difficult challenge--this agreement guarantees that Microsoft Middleware will always be invoked.

Also, Section VI, Paragraph K (definition of Middleware) states clearly that Middleware is only that software Microsoft issues to upgrade Windows; nothing in this paragraph precludes Microsoft from invoking the non-Middleware version of Internet Explorer which was an integral part of your Windows installation.

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"B. Appointment of a Technical Committee

1. Within 30 days of entry of this Final Judgment, the parties shall create and recommend to the Court for its appointment a three-person Technical Committee ("TC") to assist in enforcement of and compliance with this Final Judgment.
2. The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. Without limitation to the foregoing, no TC member (absent the agreement of both parties):
 - a. shall have been employed in any capacity by Microsoft or any competitor to Microsoft within the past year, nor shall she or he be so

employed during his or her term on the TC;

b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action adverse to or on behalf of Microsoft; or

c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC. "

Who will they get? Microsoft's business covers all segments of the computer industry; there is no company in this industry that Microsoft doesn't at least technically compete with. I spent a lot of time thinking of companies who could supply unencumbered TC members, and couldn't come up with one name. Even someone like Siebel, who makes customer relations management, or CRM, applications, could be considered a competitor--Microsoft doesn't make a packaged CRM product, but you can do CRM in Microsoft Access so Siebel is a Microsoft competitor. Not even academia is immune: Microsoft has extensive consulting and advisory contracts with university professors. If Microsoft wants to get nit-picky about this, and they will, then no "expert in software design and programming" will be eligible to sit on the TC.

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"C. Appointment of a Microsoft Internal Compliance Officer

1. Microsoft shall designate, within 30 days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of Microsoft with responsibility for administering Microsoft's antitrust compliance program and helping to ensure compliance with this Final Judgment."

This is like ordering the Medellin Cartel to appoint an internal compliance officer from their own staff to make sure they don't sell cocaine. Or directing the Chicago Mafia to appoint one of its mobsters as an internal compliance officer to ensure they shut down their gambling operations. An internal compliance officer is necessary, but to ensure that this officer ensures Microsoft's compliance with the settlement, he or she must come from outside Microsoft and must not be on the Microsoft payroll.

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"In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate."

Why only a one-time extension? Microsoft has a history of ignoring court orders, consent decrees and other conduct remedies. Allowing only one extension basically invites Microsoft to engage in a pattern of willful and

systematic violations right up front, knowing that it can only be hit with one two-year extension. After it receives its two-year extension, the absence of other penalties for non-compliance basically means Microsoft will be free to do whatever it wants.

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""Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;
2. is Trademarked;
3. provides the same or substantially similar functionality as a Microsoft Middleware Product; and
4. includes at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.

Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point."

This screws up the whole "Internet Explorer is Middleware" argument. Internet Explorer is an integral component of Windows; in fact, it's the component of every version of Windows since Windows 98 that provides the Windows user interface.

Subparagraph 1 is just strange: according to it, the version of Internet Explorer 6 which comes built in to Windows XP is not middleware, but the version of Internet Explorer 6, which does exactly what the built-in version does, is middleware. I believe this line is enough to get the whole agreement thrown out in court, since the Settlement contains no wording upholding the rest of the Settlement should parts of it be found invalid.

Subparagraph 2 is meaningless. Microsoft trademarks everything they make and every distinctively-named component of everything they make.

Subparagraph 3 is circular logic--"Microsoft Middleware does the same thing as Microsoft Middleware." (I never would have guessed!)

Subparagraph 4 is laughable. Very few computer applications put the user interface elements in one program and the functionality elements in another. Wolfram Research's Mathematica (which is designed so that the user can construct a data set on his or her personal computer then transmit it to a large shared computer for processing) and applications used to control industrial machinery are designed this way; no middleware application and certainly no Microsoft middleware application shares this construction.

"Functionality that Microsoft describes or markets as being part of a

Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product."

Unless, of course, it's a service pack for the Internet Explorer you received as part of your Windows installation, and then it's not middleware.

This also allows them to continue to bar non-Microsoft middleware from being loaded by their OEMs--if Middleware is distributed separately from Windows, then a clean load of Windows contains no Middleware (because Internet Explorer is an integral part of Windows), and therefore allowing non-Microsoft middleware to be loaded would put Microsoft at a competitive disadvantage since there is no Microsoft middleware on these machines.

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"Microsoft Middleware Product" means

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and
2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product
 - a. Internet browsers, email client software, networked audio/video client software, instant messaging software or
 - b. functionality provided by Microsoft software that --
 - i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;
 - ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and
 - iii. is Trademarked.

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product."

I am confused here. A saw is a product. Cutting wood is a functionality. I can't sell you "cutting wood" except as labor, but I can sell you a saw or wood that has been cut. Similarly, Microsoft can't sell "Internet browsing" but they can sell an Internet browser. Functionality is not a product. A product is a product.

If, on the other hand, "middleware products" are actual products and not "functionalities," this paragraph seems to be another way to circumvent the whole agreement. Since the inbuilt version of Internet Explorer is a

"middleware product" instead of "middleware," they can invoke it then claim that they're following the letter of the agreement--they didn't invoke the clearly defined "middleware" but rather the "middleware product." And they will be right.

Subparagraph b seems to have a lot of "weasel" phrases in it--phrases that are intended to let Microsoft "weasel" the product out of the agreement. To get a product declared "not a middleware product" they need only release it as part of a new Windows release. Microsoft does this regularly--there is not much difference between Windows XP and Windows 2000, for instance. Subparagraph ii goes without saying--Microsoft is not innovative and its products all have functionality similar to non-Microsoft products. Objection to subparagraph iii is the same as before--all Microsoft products and discernible parts of products have trademarked names.

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""Microsoft Platform Software" means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product."

This is a strange one indeed. It seems to define Internet Explorer for the Macintosh as Platform Software.

Cut the bull and declare Internet Explorer "middleware" no matter how the user gets it. Not three things--middleware if you download it, middleware product if it's integrated and "platform software," whatever that is.

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""Personal Computer" means any computer configured so that its primary purpose is for use by one person at a time, that uses a video display and keyboard (whether or not that video display and keyboard is included) and that contains an Intel x86 compatible (or successor) microprocessor. Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition."

The industry is moving toward "computing everywhere"--Microsoft's Xbox video game console, Ultimate TV digital video recorder, PocketPC handheld computers and WebTV set-top box are products Microsoft makes either software or the whole box for, and these are markets for which this settlement does not proscribe anticompetitive behavior by Microsoft in by virtue of this paragraph.

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""Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP

Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion."

Giving Microsoft sole discretion as to what comprises a Windows Operating System Product is what got this industry into trouble in the first place. It also eliminates one of the more effective conduct remedies: forcing Microsoft to produce a "bare bones" version of Windows. It will guarantee that Microsoft will continue in its anticompetitive ways.

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Thank you for your time

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